INDEX.

Page.

STATEMENT OF THE CASE 1

PROCEEDINGS BEFORE THE COMMISSION 2

PROCEEDINGS IN THE DISTRICT COURT 11

QUESTIONS BEFORE THIS COURT 14

ARGUMENT 15

I. THE COMMISSION'S ORDER WILL NOT RESULT IN CONFISCATION 15

II. THE FACT THAT THE WYOMING RAILWAY DOES NOT PARTICIPATE IN TRANSPORTATION UNDER THE BLANKET RATES DOES NOT PRECLUDE A FINDING OF UNDUE PREJUDICE ... 16

III. WHETHER A PREJUDICE IS "UNDUE" IS AN ADMINISTRATIVE QUESTION FOR THE COMMISSION, AND IF THE COMMISSION'S FINDING IS SUPPORTED BY EVIDENCE IT WILL NOT BE DISTURBED BY THE COURT. THERE WAS AMPLE EVIDENCE HERE 31

CONCLUSION 35

TABLE OF CASES CITED.

Central R. R. Co. of New Jersey v. *United States*, 257 U. S. 247 23

Chamber of Commerce of Ashburn, Ga., v. *G. S. & F. Ry. Co.*, 23 I. C. C. 140 21

Chamber of Commerce of Newport News v. *S. Ry. Co.*, 23 I. C. C. 345 .. 20

Cincinnati, New Orleans & Texas Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 184 28

Elk Cement & Lime Co. v. *B. & O. R. R. Co.*, 22 I. C. C. 84 22

Greenbaum Co. v. *C. & O. Ry. Co.*, 25 I. C. C. 352 22

Greenbaum Co. v. *L. & N. R. R. Co.*, 31 I. C. C. 699 22

Houston & Texas Ry. v. *United States*, 234 U. S. 342 36

Increased Rates, 1920, 58 I. C. C. 220 4

Illinois Central Railroad Company v. *Interstate Commerce Commission*, 206 U. S. 454 35

Indiana Steel & Wire Co. v. *C., R. I. & P. Ry.*, 16 I. C. C. 155 ..... 19, 21

Intermediate Rate Asso. v. *Director General*, 61 I. C. C. 226 9

Page.

Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144 32
Interstate Comm. Com. v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88 ..... 35, 36
Interstate Commerce Commission v. *Illinois Central Railroad*, 215 U. S. 452 31
Interstate Commerce Commission v. *Union Pacific Railroad*, 222 U. S. 541 31
La Grange Chamber of Commerce v. *A. & W. P. R. R. Co.*, 28 I. C. C. 178 22
Manufacturers Ry. Co. v. *United States*, 246 U. S. 457 32
Northwest Lumber Cases 3
O'Keefe, Receiver, v. *United States*, 240 U. S. 294 34
Partridge & Sons Co. v. *P. R. R. Co.*, 26 I. C. C. 484 22
Paducah Case, 245 U. S. 136 (*St. L.-S. W. Ry. Co.* v. *U. S.*) 26, 28, 29
Penna. R. R. Co. v. *International Coal Co.*, 230 U. S. 184 ..... 30, 31, 32
Pioneer Lumber Co. v. *Director General*, 64 I. C. C. 485 1
Rates on Lumber from Southern Points, 34 I. C. C. 652 22
Rates from Walsenberg Coal Field, 26 I. C. C. 85 22
R. R. Commission of Tennessee v. *Ann Arbor R. R. Co.*, 17 I. C. C. 418 ..... 19, 21
Seaboard Air Line Railway Co. v. *United States*, 254 U. S. 57 32
Sheridan Chamber of Commerce v. *C., B. & Q. R. R. Co.*, 28 I. C. C. 250 22
Southern Pac. Co. v. *Darnell-Taenzer Co.*, 245 U. S. 531 30
Southern Ry. Co. v. *United States*, 204 Fed. 465 21
St. Louis-S. W. Ry. Co. v. *United States*, 245 U. S. 136 (*Paducah Case*) 26, 28, 29
United States v. *Louisville & Nashville Railroad*, 235 U. S. 314 31

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

WYOMING RAILWAY COMPANY, APPELLANT,
v.
THE UNITED STATES OF AMERICA AND Interstate Commerce Commission, appellees. } No. 38.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

This is an appeal by the Wyoming Railway Company from a final decree of the United States District Court for the District of Wyoming (Lewis, Circuit Judge, and Riner and Kennedy, District Judges) dismissing a bill seeking to set aside the order of the Interstate Commerce Commission in Docket No. 11608, *Pioneer Lumber Co.* v. *Director General*, 64 I. C. C. 485.

The Commission's order required the Wyoming Railway Co., the Chicago, Burlington & Quincy Railroad Co., and certain other railway companies, "according as they participate in the transportation," to remove a prejudice found to exist against certain

localities on the Wyoming and certain persons there engaged in business and in favor of certain localities, chiefly on the Burlington, and persons there engaged in business, in respect of rates on lumber.

PROCEEDINGS BEFORE THE COMMISSION.

The Commission's order, now under attack, was made in a proceeding instituted by a complaint, filed by the Pioneer Lumber Company and the Buffalo Lumber Company, in which it was alleged that rates on carload shipments of lumber and lumber products from points in Idaho, Montana, and Washington, to Buffalo and Ucross, Wyo., were unreasonable in violation of Section 1, unjustly discriminatory in violation of Section 2, and unduly prejudicial in violation of Section 3 of the Interstate Commerce Act. Reparation was sought in connection with past shipments, and reasonable, nondiscriminatory, and nonprejudicial rates were asked for the future.

All railroad companies which participate in the transportation were made parties respondent, namely, Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee & St. Paul Railway Company; The Great Northern Railway Company; Northern Pacific Railway Company; Oregon Trunk Railway Company; Spokane, Portland & Seattle Railway Company; and Wyoming Railway Company.

The case was regularly heard and the Commission made its report on November 3, 1921. (Rec. 12.) In the report it was stated "no evidence was offered

in support of the allegation of unjust discrimination" in violation of Sec. 2. The Commission found that the rates to Buffalo and Ucross were not unreasonable, but that they were prejudicial as compared with rates to certain other points, in violation of Sec. 3.

The findings of the Commission and the facts upon which they are based appear in the following excerpt from the report. (Reference to the map, plf. Ex. No. 3, following page 154 of the record, will be helpful.)

> Buffalo, with a population of 1,800, is the terminus of the Wyoming Railway, 28.6 miles southwest of Clearmont, Wyo., the junction with the Chicago, Burlington & Quincy, hereinafter called the Burlington. Ucross, with a population of about 100, is also on the Wyoming, 10 miles southwest of Clearmont.
>
> * * * * *
>
> The rates on lumber and lumber products in the northwest have, for many years, been blanketed both as to points of origin and destination. In the so-called *Northwest Lumber Cases*, 14 I. C. C. 1, 23, 41, 51, decided June 2, 1908, we prescribed reasonable rates to Clearmont, which is embraced in the so-called blanket territory. The components to Clearmont on lumber and lumber products here in issue are the rates thus prescribed, increased under the general increases of 1918 and 1920.
>
> * * * * *
>
> On June 25, 1918, the rate on lumber from the coast group to Clearmont was 45 cents and

from the Spokane group 38 cents. From Clearmont to Buffalo the rate was 20 cents, making combination rates of 65 and 58 cents, respectively. The present coast-group rate is 81.5 cents and the present Spokane rate is 72.5 cents. The factors up to Clearmont are 56.5 and 47.5 cents, respectively. Complainants submitted exhibits which showed the ton-mile and car-mile earnings on shipments of lumber. These earnings were compared with earnings that would have accrued if the shipments had moved to other destinations in the blanket territory which took the same rates as Clearmont. For example, a shipment of fir lumber from National, Wash., to Buffalo, 1,270 miles, earned 10.2 mills per ton-mile and under the present rates it would earn 12.8 mills. If this shipment had moved to Spearfish, S. Dak., 1,556 miles, it would have produced 5.7 mills per ton-mile and would now produce 7.2 mills. The rates to Birds, Colo., 1,676 miles, on this shipment would have yielded 5.3 mills and 6.7 mills, respectively. The factor up to Clearmont on this shipment yielded 7.2 mills and the factor from Clearmont to Buffalo 14.03 cents per ton-mile. The present 81.5-cent rate from Everett Wash., to Buffalo, 1,128 miles, based on a load of 63,760 pounds, the average load of fir lumber as given in *Increased Rates, 1920*, 58 I. C. C., 220, by the West Coast Lumbermen's Association, yields car-mile earnings of 46.06 cents, while the present Everett-Clearmont rate of 56.5 cents produces car-mile earnings of 32.77 cents. If the Clearmont rate were extended

to Buffalo, the car-mile earnings would be 31.93 cents. The rate from Everett to Birds yields car-mile revenue of 21.45 cents.

Defendants maintain that these comparisons are of little value because blanket rates are compared with blanket rates and the specific earnings vary with the distances used. They contend that the average point of origin and the average point of destination in the respective blankets should be considered, and that as the factors up to Clearmont were prescribed by us in 1908, and subsequently increased under general order No. 28 and the general increase of 1920, they are in and of themselves reasonable.

It appears that the Wyoming incurred in 1918 an operating deficit of $46,408.72 and $24,917.89 in 1919; no interest has been paid on its bonds for nearly three years; no dividends have ever been paid on its stock; its officers and directors have received no salaries. Its line is only 28.6 miles in length and Buffalo is nearly 1,000 feet higher than Clearmont. The road is operated through a sparsely settled country, with no present prospect of increased traffic.

The above facts point to the conclusion that neither the combination rates nor the components thereof were or are unreasonable per se. The question remains as to whether the rates resulted in undue prejudice.

The Pioneer Lumber Company has lumber yards at Sheridan, 38 miles north of Buffalo by dirt road, and at Ucross as well as at Buffalo, while the Buffalo Lumber Company

has yards at Buffalo and at Kaycee, Wyo., about 60 miles south of Buffalo. The testimony shows that farmers within 8 miles north of Buffalo generally buy their lumber in Buffalo, but those farther north buy at Sheridan. There is a divide known as Tunnel Hill about midway between Sheridan and Buffalo, and save for the more favorable freight rates to Sheridan the record indicates that Buffalo would probably receive the business of those who live south of the divide. Ulm, Wyo., is on the Burlington just west of Clearmont. Competitors of the Pioneer Lumber Company located at Ulm and Clearmont are enabled by reason of their lower rates to secure trade which otherwise might go to Ucross. Casper, Wyo., is on the Big Horn division of the Burlington about 135 miles south of Buffalo and 75 miles south of Kaycee, and takes the blanket rate. The Buffalo Lumber Company's yard at Kaycee is not served by railroad, and is approximately halfway across country, between Buffalo and Casper. This complainant hauls its lumber from Buffalo to Kaycee by truck. Just prior to the hearing oil was discovered about 10 miles south of Kaycee, and the Buffalo Lumber Company insists that the blanket rate should be extended to Buffalo in order that it may use its yards at that point and haul lumber to Kaycee so that it may be able to compete in the oil field with its Casper competitors.

Spearfish and Deadwood, S. Dak., are located on the branch line of the Burlington

that connects with the main line at Edgemont, S. Dak. Edgemont is 124.4 miles distant from Clearmont, and Spearfish and Deadwood are 130 and 107 miles distant, respectively, from Edgemont. Both Spearfish and Deadwood have the blanket rates. Birds, Colo., about 400 miles beyond Clearmont, and located upon the Great Western, an independent line 82 miles long, takes the blanket rates. Complainants contend that the fact that the defendants voluntarily apply the blanket rates to these points and the further fact that defendants willingly maintain the extensive blanket, while refusing to extend blanket rates to points on the Wyoming, result in undue prejudice.

Defendants state that they extend blanket rates to points on independent short lines only when compelled to do so by competition. The Burlington extends the blanket rate from a point about 70 miles south of Billings, Mont., for a distance of about 600 miles through Alliance, Nebr., to Denver, Colo. This blanket was originally established to meet competition on lumber from California via the Harriman lines. At that time the Big Horn division of the Burlington had not been completed and to compete with the Union Pacific at Denver the Burlington had to haul lumber received from the Great Northern and the Northern Pacific via its Sheridan route through Alliance. If the former rate had not been blanketed, fourth section violations would have been created along the Sheridan line. This would not

62992—23——2

account for the Burlington's extending the blanket to Spearfish, an additional haul from Edgemont of 130 miles. Competitive reasons compelled the extension of the blanket rates to Birds. The Great Western has two connections with the Union Pacific, one at Eaton, Colo., and one at Kelim, Colo.; two connections with the Colorado & Southern, one at Loveland, Colo., and one at Windsor, Colo., besides the connection with the Burlington at Longmont, Colo. Defendants contend that this competition distinguishes the situations at Birds and at Buffalo. But there is no such carrier competition at local main-line and branch-line stations on the Burlington in this blanket territory.

Since the trunk line carrier publishes the same blanket rate on lumber in carloads to destinations located over a considerable stretch of its main line and also extends that rate to points located on its branch lines, a shipper situated on an independent branch line connecting with this blanketed stretch of the main line is entitled to the blanket rate, especially where the service over the independent branch line is not in excess of the average service over the trunk line's own branches. It may be cheaper to perform a given service for equal distances to points located on a trunk line or on its branch lines than to points on an independent line. It is not cheaper for the Burlington to perform the service from Edgemont to Spearfish than for the Wyoming Company to perform the service from Clearmont to Buffalo. The mile-

age from Edgemont to Spearfish is over 4.5 times greater than that to Buffalo. Buffalo and Ucross are entitled to the blanket rates.

The question of divisions, and whether or not the Wyoming should receive its full local or only part thereof out of the blanket rate is not here in issue.

There is no competition between retail lumber dealers situated at considerable distances apart in this extensive blanket territory. The inhibition of section 3 of the interstate commerce act against undue prejudice applies to localities as well as to shippers at those localities. As was said in *Intermediate Rate Asso.* v. *Director General*, 61 I. C. C. 226, at page 233, respecting competition between localities:

"Thriving communities, all in the same general section of the country, striving for population, industry, and business growth, may not need elaborate evidence to show that they are entitled to relief if the rates are not properly related."

We find that the interstate rates assailed on lumber and lumber products were not and are not unreasonable; * * * but that the failure of defendants to extend the blanket rates on lumber to Buffalo and Ucross on the line of the Wyoming Railway, while at the same time maintaining the blanket rates to other more distant points in the blanket territory on defendants' main and branch lines or on independent connecting lines, is and for the future will be unduly prejudicial. Complainants have not shown that they were

damaged by any undue prejudice which may have existed in the past. Reparation is therefore denied. (Rec. 13–17.)

The pertinent language of the order follows:

> *It is ordered,* That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before February 24, 1922, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of lumber and lumber products, in carloads, from points in Idaho, Montana, and Washington to Buffalo and Ucross, Wyo., rates which exceed the rates made on the basis prescribed in the next succeeding paragraph hereof.
>
> *It is further ordered,* That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before February 24, 1922, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of lumber and lumber products from points in Idaho, Montana, and Washington to Buffalo and Ucross, Wyo., rates which do not exceed the rates contemporaneously maintained by them on lumber and lumber products from the same points to Clearmont and Sheridan, Wyo., and other points in the blanket territory on defendants' lines and independent connecting lines." (Rec. 17, 18.)

PROCEEDINGS IN THE DISTRICT COURT.

January 16, 1922, the Wyoming Railway Company filed its bill of complaint in the court below for the purpose of enjoining the enforcement of the Commission's order. (Rec. 1.) The other railway companies against which the order was directed apparently acquiesced in the order, for none joined in the action.

The bill did not deny any of the evidential facts set forth in the Commission's report or allege additional material facts.

The United States filed a motion to dismiss (Rec. 21) and the Commission filed an answer. (Rec. 22.) On these pleadings, the court below heard the case, denied the application for temporary injunction, and dismissed the bill. (Rec. p. 24.)

The following oral opinion was delivered:

> The Court (by Judge Lewis): It appears from the bill of complaint in this case that the Pioneer Lumber Company and the Buffalo Lumber Company complained before the Interstate Commerce Commission against the Director General of Railroads, the Chicago, Burlington & Quincy Railroad Company, the Chicago, Milwaukee & St. Paul Railway Company, the Great Northern Railway Company, the Northern Pacific Railway Company, the Spokane, Portland & Seattle Railway Company, and the Wyoming Railway Company for violation of the first three sections of the Interstate Commerce Act. On hearing before the Commission it was found that there had been no violation of sections one and two, but

that the practice of all of the defendants in putting in effect a rate of 81½¢ on lumber from Washington and Pacific Coast points to Ucross and Buffalo, and a rate of 72½¢ from points in the Spokane group to Ucross and Buffalo, was unduly prejudicial to the Pioneer Lumber Company, to the Buffalo Lumber Company, and to the two localities of Ucross and Buffalo.

That conclusion was arrived at on account of the blanket rate to Clearmont, Sheridan, Alliance, Edgemont, Deadwood, Spearfish, and other points being 25¢ lower than to Ucross and Buffalo, and that Ucross and Buffalo being in the same section or territory, this worked undue prejudice to the two complainants and to these localities, and on that the Commission made its order finding that these defendants, acting together, should put in a new rate to Buffalo and Ucross in order to remove that undue prejudice to these two localities and to the two complainants. The higher rates to Ucross and Buffalo were brought about by adding the complainant's local rate to the blanket rate at Clearmont, the junction point.

Now, the third section of the Interstate Commerce Act undoubtedly vests the Commission with power to take such action as may be necessary to remove undue prejudice to shippers and localities located in the same general section of the country. That appears to be a part of their duties and the purposes of establishing the Commission. Much has been said on the part of the complainant as to the present blanket rates, and that its

share of those two rates, if they are to prevail, will be so small that the compensation to it will be confiscatory.

We are of the opinion that this court can not assume that the present blanket rates will stand if, in the prorating, they will work confiscation of the complainant's property. Counsel for the Government and counsel for the Commission have indicated several ways in which that may be avoided. If the present rates are to stand; that is, if the present blanket rates are to be applied to Buffalo and Ucross the carriers west of Billings may be required to contribute a part of their present share of those rates, and the Burlington may likewise be required to contribute a part of its share of those rates south of Billings, so as to make up to the complainant the necessary compensation for the haul from Clearmont to Ucross and Buffalo, in order that confiscation may be avoided. Again, the carriers may have the right to raise the blanket rates to the extent of equalizing them to the Ucross and Buffalo rates.

We all agree that in the present status of the proceeding this court is without power to take action, that the rights of the Wyoming Railway Company under the order of the Commission have not yet been determined, and it is impossible to know whether or not the action of the defendants in obeying the order of the Commission will result in confiscation. We understand that the Interstate Commerce Act empowers the Commission to adjust a proportionate division of a through rate be-

tween common carriers where they are unable themselves to agree upon it. For these reasons we are of opinion that the application for a temporary injunction should now be denied.

There is a motion on the part of the United States to dismiss; and while the Commission has answered, it is practically a motion to dismiss also on its part, because it justifies, and does no more than justify, the action that it took in ordering the extension of the same rates to Buffalo and Ucross as to other towns in this general section of the country. We think the bill should be dismissed. (Rec. 32, 33.)

QUESTIONS BEFORE THIS COURT.

The Wyoming appealed to this Court, making general assignments of error to the effect that the District Court erred in denying the injunction and dismissing the bill.

Appellant relies upon three contentions to show that the Commission's order should be set aside:

1. The order will result in the confiscation of its property.

2. The Commission can not find a relationship between two rates prejudicial, although one or more carriers participate in the transportation under both rates, if one of the carriers which participates in the transportation under one rate does not also participate in the transportation under the other rate.

3. There is no evidence to support the finding that the prejudice against Buffalo and Ucross was "undue."

These contentions will be answered in order.

ARGUMENT.

I.

THE COMMISSION'S ORDER WILL NOT RESULT IN CONFISCATION.

The claim of confiscation, as a separate and distinct ground for setting aside the order, is apparently abandoned in appellant's brief in this Court. But the point seems to be relied upon in a more or less indirect fashion, and a short answer may not be out of place.

The claim is based upon the fact that appellant was operating at a loss and upon the assumption that the Commission's order would reduce its revenue from lumber transportation.

The assumption is erroneous. The order does not require the reduction of any rate. It does not fix rates but merely the adjustment of rates. The order would be satisfied if the blanket rates, applicable to Clearmont, Spearfish, etc., were raised to the level of the present rates to Buffalo. Moreover, even if the order required the reduction of the Buffalo rate, this would not necessarily result in a reduction of the revenue of the Wyoming Railway. That would depend upon the division of the new rate. The Wyoming could come to the Commission to have just and reasonable divisions fixed. After that, and not before, conceivably, the question of confiscation might arise. On this point, attention is called to the following language in the Commission's report:

> The question of divisions, and whether or not the Wyoming should receive its full local or only part thereof out of the blanket rate is not here in issue. (Rec. 16.)

62992—23—3

II.

THE FACT THAT THE WYOMING RAILWAY DOES NOT PARTICIPATE IN TRANSPORTATION UNDER THE BLANKET RATES DOES NOT PRECLUDE A FINDING OF UNDUE PREJUDICE.

The question which will be discussed under this head involves a construction of that part of Section 3 reading as follows:

> That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The position taken by appellant on this branch of the case is stated in paragraphs XVII and XIX of its bill as follows (Rec. 7, 8):

XVII.

> Plaintiff further shows that the defendant common carriers in the said proceeding before the Interstate Commerce Commission other than the Wyoming Railway Company are without power under the law to extend present blanket rates on lumber now applicable to Clearmont, Wyoming, and other points on their lines, to the local stations of Ucross and Buffalo, Wyoming, on the line of the Wyoming Railway Company, unless the Wyoming Railway Company consents thereto. Plaintiff

shows that the Wyoming Railway Company declines and refuses to permit other said carriers to extend such blanket rates to points on its line, but instead insists that the service which it performs justifies higher rates to points on its line than to points on the lines of other carriers. Plaintiff further states that the effort of the Interstate Commerce Commission to compel and require the Wyoming Railway Company to permit carriers other than itself to establish said blanket rates to points on its line is arbitrary and void.

XIX.

Plaintiff further states that the Wyoming Railway Company can not be jointly or severally held responsible for any undue prejudice in connection with the rates on lumber from producing points in Idaho, Montana, and Washington, to points on the lines of other railway companies where it does not participate in the transportation, nor join in the publication of the said rates, and that any order made in respect to the Wyoming Railway Company in these circumstances is unsupported by any substantial evidence and is contrary to the law, exceeds the power of the Interstate Commerce Commission, and is arbitrary and void, as to the Wyoming Railway Company, and as the carriers other than the Wyoming Railway Company can not comply with the order of the Commission entered without the consent of the Wyoming Railway Company, the order is likewise arbitrary and void as to them.

The practical significance of appellant's contention will be more readily understood in the light of a concrete example taken from the facts in this case.

On lumber moving from National, Wash., to Buffalo, the Burlington and its western connection perform the transportation for a distance of 1,242 miles to Clearmont and the Wyoming for a distance of 28 miles from Clearmont to Buffalo. On lumber moving from the same point of origin to Sheridan, Clearmont, Spearfish, and the other points taking the blanket rate, the Burlington and its western connections perform the entire transportation.

The relationship, which the Commission found unduly prejudicial to Buffalo, was the relationship between the blanket rate and the rate to Buffalo. As pointed out above, the identical carriers which perform the transportation under the blanket rate perform 1,242 miles of the 1,270 miles of transportation under the rate to Buffalo.

Is the Commission powerless to remove the prejudice simply because the Wyoming, which does not participate in the transportation under the blanket rate, does participate for an extremely short distance in the transportation to Buffalo?

This question has been before the Commission literally hundreds of times and the Commission has always held that it was not without power to remove a prejudice arising from the improper relationship of two rates, when one or more carriers were parties to both rates, simply because one of the carriers which participated in transportation

under the one rate did not participate in transportation under the other rate.

Indiana Steel & Wire Co. v. *C. R. I. & P. Ry.*, 16 I. C. C. 155, decided in 1909, was one of the early cases in which the question arose. The Commission there found that rates from Kokomo and Muncie, Ind., to Arkansas common points were prejudicial as compared with the rates from Chicago to the same destinations. The only carriers which served Kokomo and Muncie did not participate in the transportation from Chicago; but to Arkansas points, the traffic from Chicago and the traffic from Muncie and Kokomo moved over the same railroads west of the Mississippi River crossings.

In *R. R. Commission of Tennessee* v. *Ann Arbor R. R. Co.*, 17 I. C. C. 418, it was found that the rate on cotton from Jackson, Tenn., to New England mills was unduly prejudicial as compared with the rate on cotton from Brownsville, Tenn., to the same destinations. The Louisville & Nashville was the only road serving Brownsville, and it did not participate in the transportation from Jackson. North of the Ohio River the transportation from Jackson and from Brownsville was over the same railroads. The Commission said, at page 421:

> It is urged, further, that the line from Brownsville to destination is not the same as the line from * * * Jackson. But this is not a question under the fourth section, and therefore not a question of the same line. The inquiry is, Do these defendants by their

joint rates unduly discriminate against Jackson in favor of Brownsville? In our opinion they do. This discrimination does not exist by virtue of the action of the Louisville & Nashville alone but by reason of the united action of these different defendants. Without the consent of the lines north of the Ohio the discrimination would not exist, and it therefore lies within the power of those lines to stop it. If the Louisville & Nashville extended all the way from Brownsville to the delivering point, a different question would be presented. * * * We do not think that the fair intent of the act would permit the discrimination here existing in these rates between two localities but 25 miles apart where the service for more than half the distance is by the same railroad. The Nashville, Chattanooga & St. Louis Railway extends from Jackson north to Paris, where it unites with the Louisville & Nashville. Cotton from Jackson passes 80 miles over the Nashville, Chattanooga & St. Louis and for the balance of the distance over the same line as that from Brownsville. Assume, now, that the Louisville & Nashville elected to maintain a rate of 70 cents from Brownsville, but the Nashville, Chattanooga & St. Louis, as the initial line, established a rate of 60 cents from Jackson. Could it be said that this road which hauls the traffic but 80 miles out of a total distance of 1,306 miles is entitled to create and perpetuate that rate condition? We think not. * * *

In *Chamber of Commerce of Newport News* v. *S. Ry. Co.*, 23 I. C. C. 345, it was found that rates from

southeastern freight association territory to Newport News were unduly prejudicial as compared with rates from the same points to Norfolk. The Commission said, at page 352:

> The Southern, Coast Line, Seaboard, and Norfolk & Western contend that their lines do not serve Newport News, and for that reason they can not be held responsible for any discrimination that may exist against Newport News. While it is true that none of their lines actually reaches Newport News, nevertheless they all participate in Newport News traffic to and from the south by way of Norfolk or through connections with the Chesapeake & Ohio at Richmond.
>
> * * * * *
>
> The southern carriers participate actively in Newport News traffic to and from the south and southwest, and they practically control the rates between Newport News and points within association territories. The fact that their rails do not extend to Newport News can not relieve them from responsibility for the effect of rates which they control and in which they participate. *R. R. Com. of Tenn.* v. *A. A. R. R. Co.*, 17 I. C. C. 418; *Indiana Steel & Wire Co.* v. *C., R. I. & P. Ry. Co.*, 16 I. C. C. 155; *Chamber of Commerce of Ashburn, Ga.*, v. *G. S. & F. Ry. Co.*, 23 I. C. C. 140.

The Commission's order was upheld by the Commerce Court, *Southern Ry. Co.* v. *United States*, 204 Fed. 465.

It will be observed that each of these cases involved a situation where one or more carriers partici-

pated in transportation under one rate in the improper adjustment but not in transportation under the other rate and where one or more other carriers participated in transportation under both rates.

Other cases in which the Commission followed the same rule are very numerous and include the following:

> *Elk Cement & Lime Co.* v. *B. & O. R. R. Co.*, 22 I. C. C. 84, 89; *Greenbaum Co.* v. *C. & O. Ry. Co.*, 25 I. C. C. 352, 355; *Rates from Walsenberg Coal Field*, 26 I. C. C. 85, 89; *Partridge & Sons Co.* v. *P. R. R. Co.*, 26 I. C. C. 484, 486; *La Grange Chamber of Commerce* v. *A. & W. P. R. R. Co.*, 28 I. C. C. 178, 184; *Sheridan Chamber of Commerce* v. *C., B. & Q. R. R. Co.*, 28 I. C. C. 250, 258; *Greenbaum Co.* v. *L. & N. R. R. Co.*, 31 I. C. C. 699, 707; *Rates on Lumber from Southern Points*, 34 I. C. C. 652, 671.

In many of the cases which have come before the Commission, the rates, the relationship of which was prejudicial, were joint rates. That is to say, the carrier, which participated in transportation under one of the rates and not under the other, performed such transportation under a rate jointly established by it and the other carriers taking part in that transportation, such other carriers being parties also to the transportation under the other rate in the prejudicial relationship.

In this case, the rate to Buffalo was not a joint rate but a combination of the local rate to Clearmont and the local rate of the Wyoming from Clearmont

to Buffalo. This difference is pointed out for the purpose of showing that it is not important. A combination of local rates applicable over a through route such as we have here, is a through rate just as a joint rate is a through rate. The only distinction is in the form of publication. Both a joint rate and a combination through rate apply to continuous transportation performed as a result of an arrangement, express or implied, between the carriers. A combination rate is to be regarded as a unit and if it is unreasonably high it may be reduced by the Commission regardless of the reasonableness of its component parts.

Appellant, in support of its contention that there can be no prejudice because the Wyoming does not participate in transportation under the blanket rates, relies chiefly on *Central R. R. Co. of New Jersey* v. *United States*, 257 U. S. 247. But that case is essentially different from this case. There the facts were as follows: Joint through rates were published on forest products from points in the south to points north and east of Newark, N. J. Shipments moving under these rates passed over the lines of several different carriers. At certain points in the south, on the route of movement under these rates, the southern carriers granted a creosoting in transit privilege.[1] The Pennsylvania Railroad and the Jersey Central

[1] The court described the privilege on page 254 as follows:

"By the privilege called creosoting in transit, forest products received for shipment may be stopped and unloaded at an intermediate point, there subjected to the process of creosoting, and later forwarded on the original bill of lading to the destination therein named."

Railroad refused to grant a similar privilege at Newark. Upon a complaint, naming the Pennsylvania, the Jersey Central, and certain other carriers as respondents, but failing to include as respondents the railroads which granted the transit privileges in the south, the Commission found that the failure to grant the privilege at Newark while it was being granted at the southern points constituted a prejudice against Newark.

This court held that the Commission's order was void because a transit privilege is a matter local to the railroad on which the transit point is located, saying:

> * * * Under the rules of the Commission governing the making, filing and publishing of tariffs, privileges like creosoting-in-transit are treated as a matter local to the railroad on which the transit point is situated. Whether the privilege shall be granted or withheld is determined by the local carrier. If granted, the local carrier determines the conditions; and these are set forth in the local tariff. * * *

It follows that the Pennsylvania and the Jersey Central, which refused the privilege at Newark, were not responsible for the action of the southern carriers in granting the privilege at points on their lines and the southern lines were not responsible for the failure of the Pennsylvania and Jersey Central to grant the privilege at Newark.

A prejudice results from a relationship between two rates or practices. In the *Jersey Central case* the relationship was between two practices, the granting

of the privilege at southern points and the failure to grant it at Newark. No one carrier was in whole or in part responsible for both practices. In this case, the prejudice results from the relationship between two rates—first, the blanket rate, and second, the rate to Buffalo. The Burlington and its western connections participate in both of these rates.

The question here is whether the Wyoming can, as a legal right, obstruct the Commission's effort to remedy the prejudice, particularly when it can not show, as we will point out, that to do so would decrease its revenue or otherwise injuriously affect its interests.

The Wyoming alleges in its bill, paragraph XIX (Rec. 7), that the other carriers can not remove the prejudice without its consent, and alleges, in paragraph XVII (Rec. 7), that it refuses to permit the other carriers to extend the blanket rates to points on its line.

As a matter of fact, the other carriers could, as before explained, comply with the Commission's order without the consent of the Wyoming by raising the blanket rates to the level of the Buffalo rate or by establishing proportional rates to Clearmont on lumber destined to points on the Wyoming which, when added to the local rates of the Wyoming, would produce combination through rates equal to the blanket rates.

The consent either voluntary or enforced, of the Wyoming would be necessary if the Commission's order were to be complied with by publishing joint

rates to points on its line no higher than the blanket rates. Even if this method were adopted, there is no reason to believe that the Wyoming would receive less revenue than it obtains under its present local rates. This would depend upon its divisions which the Commission has the power to fix. In fixing those divisions, no doubt the Commission could consider that the blanket rates to points on the Wyoming, lower than rates which the Commission has found are not unreasonable, were primarily the result of the action of the Burlington and its Western connections in maintaining the blanket rates to points much farther distant than the points on the Wyoming. No one can say at this time that the divisions which the Wyoming would receive would not be equal to the local rates it now receives.

We have tried to show that the *Jersey Central case* is not controlling here. In this connection, it is noteworthy that the court in that case referred with approval to *St. Louis-S. W. Ry. Co.* v. *United States*, 245 U. S. 136, the so-called *Paducah case*, which, in so far as it involved Sec. 3, is almost exactly like the case at bar. There, an order of the Commission, based upon a finding that the lumber rates from the southwest to Paducah were unreasonable and unduly prejudicial as compared to the rates to Cairo, was under review. Paducah is situated on the south bank of the Ohio River, 42 miles above Cairo, Ill. Each city is a manufacturing and jobbing center for lumber and draws its lumber in part from the extensive region lying west of the

Mississippi River and south of the Arkansas River, known as the "blanket territory." The principal railroads serving the blanket territory were the St. Louis-Southwestern, St. Louis, Iron Mountain & Southern, and Chicago, Rock Island & Pacific. The first two had their own lines from the blanket territory to Cairo, and could reach Paducah only over a connecting line. The Rock Island reached both Cairo and Paducah only over a connecting line. The Rock Island had established a route via Memphis; but the other two companies had through routes to Paducah only via Cairo. From Cairo to Paducah transportation was over the Illinois Central. As to the Memphis route, transportation from Memphis was via the Illinois Central. The rate to Cairo was 16 cents and the rate to Paducah, via Cairo, a combination rate made up of the 16-cent local rate to Cairo plus the 6-cent local rate from Cairo to Paducah. The Commission found that (1) the 22-cent rate to Paducah was unreasonable in that it exceeded the existing rate to Cairo; (2) that the existing disparity of rates gave to Cairo an undue preference and advantage over Paducah; (3) that through routes and joint rates no higher than Cairo rates should be established to Paducah via either Memphis or Cairo.

The carrier connecting at Cairo (the Illinois Central) acquiesced in the order establishing the joint rate.

The court upheld the Commission's order and said at page 144:

> The carriers insist also that the order is void on the ground that since their "rails

> do not reach Paducah they can not be guilty of discrimination against that city." They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reach Paducah, although not on their own rails, and thereby they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose "rails" reach them. Clearly, the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission, supra.* (162 U. S. 184.)

The court said further at page 143.

> If these complaining carriers can not reach satisfactory agreements with the Illinois Central as to what its share of the 16-cent rate should be, they may, under section 15 of the act to regulate commerce, apply to the Commission for an appropriate order. In respect to the Rock Island the situation is similar.

It is true that in the *Paducah case* there was a finding of unreasonableness as well as a finding of prejudice, the court saying, at pages 144, 145:

> * * * The order in the case at bar is not merely one to prevent discrimination. * * * It is not primarily an order to remove discrimination in violation of section 3.

Nevertheless, the discussion in the opinion indicates clearly that the order was sustainable on grounds of discrimination, regardless of other grounds.

The case at bar is similar to the Paducah case. In this case the Burlington and its western connections occupy the same position that the Iron Mountain, St. Louis-Southwestern, and the Rock Island occupied in the Paducah case; that is to say, they participate in two rates, the relationship of which is unlawful. And the Wyoming in this case stands in the position of the Illinois Central in the *Paducah case;* that is to say, it is a party to the transportation under one of the rates, but not to transportation under the other. It participates in the transportation to Buffalo but not in the transportation to points on the Burlington, as the Illinois Central participated in the transportation to Paducah, but not in the transportation to Cairo. In the Paducah case the Illinois Central did not protest the order as the Wyoming is protesting in this case, but the failure of the Illinois Central to protest could not empower the Commission to make a finding of prejudice if, as a matter of law, no prejudice existed.

Before leaving this question we should point out that if the Commission can not remedy a rate situation such as that here presented by a finding of prejudice under Section 3, it can not satisfactorily reach it at all.

It may be suggested that the Commission has ample power to properly adjust the rates by findings of unreasonableness under Section 1 and by fixing

maximum or minimum rates, or both. But such a course would present serious difficulties. The rate to Buffalo, standing by itself, is not unreasonably high or otherwise unlawful; the blanket rate standing by itself is not unreasonably low or otherwise unlawful. The real evil is the relationship between these rates, and the only way of striking *directly* at this relationship is by a finding of prejudice.

Would the Commission be justified in attempting to cure the evil *indirectly* by findings of unreasonableness? The distinction between a finding of unreasonableness and a finding of prejudice is of great practical importance, and this is at once manifest when we consider that the rule respecting reparation in the case of a finding of unreasonableness is different from that applicable in the case of a finding of prejudice.

A shipper who pays an unreasonable rate is entitled to recover the excess between that rate and a reasonable rate without further showing of damage. The fact that he may have passed on the damage to the purchasers of the goods or to others is immaterial. *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531. On the other hand, the fact that a shipper has paid a rate which was unduly prejudicial to him when compared with the rate paid by another shipper is not, of itself, sufficient to support an award of reparation. He is entitled to a recovery only if he can show actual pecuniary loss. *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184.

In view of this distinction as to reparation, it would seem that the Commission should carefully avoid findings of unreasonableness when the real evil is merely a prejudicial rate adjustment. Complainant in this case showed no pecuniary loss as a result of the rate prejudice and reparation was accordingly denied. If the Commission had found the rate to Buffalo unreasonably high, complainant would have been entitled to reparation down to the basis of the rate found reasonable.

III.

WHETHER A PREJUDICE IS "UNDUE" IS AN ADMINISTRATIVE QUESTION FOR THE COMMISSION AND IF THE COMMISSION'S FINDING IS SUPPORTED BY EVIDENCE, IT WILL NOT BE DISTURBED BY THE COURT. THERE WAS AMPLE EVIDENCE HERE.

Appellant urges that the prejudice disclosed by the record was not "undue."

By a long line of decisions this Court has established the doctrine that the Commission's judgment on administrative questions is final if supported by evidence. The Court will not review the wisdom of the Commission's order, or substitute its judgment for that of the Commission, even when it is conceded that the facts would support a finding contrary to that reached by the Commission. *Interstate Commerce Commission* v. *Illinois Central Railroad,* 215 U. S. 452, at 470; *Interstate Commerce Commission* v. *Union Pacific Railroad,* 222 U. S. 541, at 547; *Penna. R. R. Co.* v. *International Coal Co.,* 230 U. S. 184, at 196; *United States* v. *Louisville & Nashville Railroad,*

235 U. S. 314, at 320; *Seaboard Air Line Railway Co.* v. *United States*, 254 U. S. 57, at 62.

In *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, at 481 it was said:

> Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170), and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.

In *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, at 196, it was said:

> Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has

> been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals."

The only question, arising under this contention of appellant, which is now open, is whether there was evidence to support the Commission's finding that the prejudice was "undue."

The undisputed facts set forth in the Commission's report, quoted hereinbefore, are amply sufficient. It will serve no purpose to repeat or summarize them, but we do desire to again direct attention to certain of them.

Rates on lumber in the northwest have for many years been blanketed both as to points of origin and destination. From points of origin here involved blanket rates are in force to destinations on that part of the main line and branch lines of the Burlington beginning about 70 miles south of Billings, Mont., and extending through Clearmont and Alliance, about 600 miles to Denver. Blanket rates also apply to points on at least one independent line connecting with the Burlington in this territory, namely, the Great Western, which serves Birds, Colo. Clearmont, the junction between the Burlington and the Wyoming, is within the blanket territory, about 181 miles south of Billings. Buffalo and Ucross are points on the Wyoming, 28 and 10 miles, respectively, from Clearmont. The blanket rates are 56.5 cents per hundred pounds from points of origin in the coast

group and 47.5 cents from Spokane. The rates to Ucross and Buffalo are higher than the blanket rates. From the coast group the rate to Buffalo is 81.5 cents and from Spokane 72.5 cents.

The blanket rates apply to points much farther distant from points of origin than Buffalo. For example, from National, Wash., a typical point of origin in the coast group, to Buffalo is 1,270 miles. From the same point to Spearfish, S. Dak., the distance is 1,556 miles; to Deadwood, S. Dak., 1,533 miles; and to Birds, Colo., 1,676 miles. Although there is no competition between lumber dealers located at considerable distances apart in this extensive blanket territory, there is competition between the complainants, located at Buffalo and Ucross, and lumber dealers at Clearmont, at Sheridan and Ulm, Wyo., on the Burlington, a few miles west of Clearmont, and at Casper, Wyo., on the Burlington, 135 miles south of Buffalo, all of which take the blanket rates.

Plainly appellant's contention that there was no evidence to support the Commission's finding that the prejudice is "undue" is without merit.

In *O'Keefe, Receiver,* v. *United States,* 240 U. S. 294, at page 303, it was stated:

> It is said there was no evidence to enable the commission to fix a just compensation to that line for a haul of a given number of miles as compared with the just compensation for a haul of a greater or lesser number of miles; no evidence as to terminal expenses, or cost

> of road haul, or the relation between these factors, or as to other elements which should be taken into account in fixing a division according to the length of haul. But the evidence showed that some limitation was called for, and, in general at least, furnished the materials upon which to base it. A tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others.

In *Interstate Comm. Com.* v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88, at 110, 111, it was said:

> One question remains for discussion, the finding of the commission upon the character of the rate, whether it is unreasonable as decided. Such decision, we have said with tiresome repetition, is peculiarly the province of the commission to make, and that its findings are fortified by presumptions of truth, "due to the judgments of a tribunal appointed by law and informed by experience." *Illinois Central Railroad Company* v. *Interstate Commerce Commission*, 206 U. S. 454, and cases cited. The testimony in this case does not shake the strength of such presumptions.

CONCLUSION.

The relative adjustment of rates is generally of greater importance to shippers than the level of rates. The chief purpose of the regulation of interstate carriers was to do away with discrimination between persons and places. Regulatory legislation

was based on the theory that "the paramount evil chargeable against the operation of the transportation system of the United States" was such discrimination. *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 356. And the Commission was instituted to prevent such discrimination. *Interstate Comm. Com.* v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88, 102.

The situation before the Commission presented a typical instance of discrimination between persons and localities. The evil could be directly remedied only by a finding of undue prejudice under Section 3. It could not be satisfactorily remedied by findings of unreasonableness under Section 1.

The Burlington and its western connections participated in the transportation under both rates, the relationship of which was improper. The Wyoming participated in the transportation under one rate but not under the other. This carrier should not be permitted to obstruct the removal of the maladjustment particularly when it is not in a position to show that compliance with the Commission's order would reduce its revenue or otherwise injuriously affect its interests.

J. CARTER FORT,
Solicitor for the Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

WASHINGTON, D. C., *September, 1923.*

○